



## Alerts

### Supreme Judicial Court of Massachusetts Clarifies Title Insurance Company's Duty to Defend and Narrows the Scope of Title Insurance Coverage

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Insurance Coverage Alert

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In *GMAC Mortgage, LLC v. First American Title Insurance Company*, 464 Mass. 733 (Apr. 4, 2013), an insured mortgagee brought claims against a title insurer, seeking to recover attorneys' fees and costs that stemmed from defending against an underlying lawsuit claiming a covered title defect, but also alleging uncovered claims for intentional infliction of emotional distress and violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A. In Massachusetts, the general rule is that commercial liability insurers assume a broad duty to defend their policyholders and, if an insurer has a duty to defend one of the underlying counts in a complaint, the insurer must also defend the remaining counts in the complaint. This is commonly referred to as the "in for one, in for all" defense rule. In *GMAC*, the insured alleged that the title insurer had a duty to defend the all claims in the lawsuit because the title insurance policy covered the claim asserting a title defect.

The title insurer contended that the "in for one, in for all" rule did not apply to title insurance policies and that the additional claims were outside the scope of the policy. The Court agreed, finding the "in for one, in for all" rule inapplicable within the title insurance context. It noted that title insurance policies are fundamentally different from general liability insurance policies. Specifically, title insurance narrowly covers defects in, or encumbrances on, title that are in existence at the time the policy is issued and requires one single premium payment for indefinite coverage. To the contrary, general liability insurance is generally directed at future risks, and is predicated upon the continued payment of premiums. The Court emphasized the rationale behind the "in for one, in for all" rule that allocating between covered and noncovered claims was impractical and, on the other hand, noted that title issues are discrete and can be bifurcated from unrelated claims. The Court further held that a title insurer does not have to defend counterclaims, with the possible exception of compulsory counterclaims, asserted against an insured when the title insurance company brings a lawsuit in the insured's name to clear a title defect. Thus, a title insurer, at its option under the policy, may initiate litigation to quiet title or address a defect in title and cause its insured to become embroiled in potentially uncovered litigation.

Subsequently, in *Deutsche Bank National Association v. First American Title Insurance Company*, 465 Mass. 741 (July 11, 2013), an insured assignee of a promissory note and mortgage sued a title insurer seeking repayment for defense costs stemming from a third-party suit by a mortgagee. The insured argued that the title insurance policy provided coverage because the complaint asserted that "the entire mortgage transaction -- note and mortgage included -- is voidable because of fraud in the inducement" and sought to "rescind the security interest." The title insurer argued that the policy did not apply because the mortgagee's third-party action concerned the invalidity or unenforceability of the underlying mortgage debt (i.e. promissory note), rather than the security interest (i.e. mortgage). The Court concluded that there is no coverage when the "substance" of the complaint concerns the validity of the underlying loan, and does not primarily concern "whether the mortgage was improperly executed, improperly recorded, or otherwise procured by fraud. Even though the complaint included a claim to rescind mortgage, the court held it was still outside the scope of coverage because it was only a "collateral consequence of the main relief sought, voiding the loan indebtedness."



### **Practice Note**

The rulings by the Supreme Judicial Court are significant because they limit a title insurer's duty to defend and also narrow the coverage available to insureds, even when a potentially covered claim is asserted. Attorneys, insurers and insureds should be mindful of the constraints to a title insurance policy in Massachusetts and recognize the modified scope of a title insurer's coverage obligations.